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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT - 5 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of the)
Application of)
)
RICHARD A. BURTON)
Harbor City, California)
)
For Amateur Station)
and Operator Licenses)

PR Docket No. 92-144

To: Review Board

OPPOSITION TO EXCEPTIONS

On September 24, 1992, pursuant to Section 1.276 of the Commission's Rules, 47 C.F.R. § 1.276, the respondent, by his attorney, filed exceptions to the Summary Decision (Richard A. Burton, FCC 92D-55) released in this proceeding on August 26, 1992. The Chief, Private Radio (Bureau), by his attorney, opposes the respondent's exceptions.

1. The respondent argues that it was procedurally incorrect for the presiding administrative law judge to issue a Summary Decision without acting on the respondent's request for an extension of the time in which to reply to the Bureau's Motion for Summary Decision. The Bureau believes that it was proper to issue the Summary Decision without acting on the respondent's request for an extension.

2. The Bureau moved for summary decision on July 31, 1992. Any opposition from the respondent was due no later than August 13, 1992. The respondent did not request an extension of time until August 19, 1992 -- 6 days after a response was due and 1 day after the presiding administrative law judge issued

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his Summary Decision (on August 18, 1992). The respondent's request, therefore, was made too late to be acted on.

3. Furthermore, even if the respondent's motion for an extension had arrived in time for consideration, the judge would still have had to deny it. The sole basis for the motion was that counsel was not engaged until August 14, 1992, and needed additional time to familiarize himself with the case and prepare a response. Delay in engaging counsel does not constitute "good cause" for an extension of time. It was incumbent on the respondent to engage counsel soon enough to permit a timely response.

4. The respondent claims that he was denied due process because he did not have notice that the presiding administrative law judge would consider as determinative the respondent's failure to submit a list of witnesses and an outline of evidence by July 29, 1992, as required by the judge's procedural order. Paragraph 4 of the Summary decision begins "Burton has not complied with the order to submit an outline of evidence and witness list by July 29, 1992." This information was clearly intended to support the presiding administrative law judge's determination that Burton did not prosecute his application. Section 1.961(b) of the Commission's Rules, 47 C.F.R. § 1.961(b), put the respondent on notice that failure to prosecute his application would be a ground for denial.

5. Finally, if the presiding administrative law judge had been able to consider the respondent's response filed August 31, 1992, to the Bureau's motion for summary decision, it should not have had any effect on his decision. The facts on which the presiding administrative law judge based his decision are not in dispute. The respondent's ten-year history of violating the

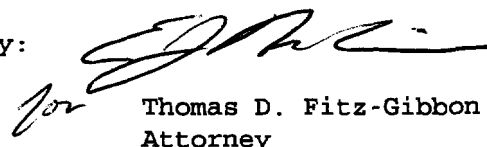
Communications Act was established by his criminal convictions.¹ The collateral estoppel aspect of the doctrine of res judicata applies to those convictions. The extent and seriousness of Burton's violations clearly disqualify him from becoming an amateur service licensee. The presiding administrative law judge correctly found that there was no genuine issue of material fact.

6. For the reasons given above, the Bureau respectfully requests that the respondent's exceptions to the Summary decision be denied and that the Summary decision be affirmed.

Respectfully submitted,

Ralph A. Haller
Chief, Private Radio Bureau

By:


for Thomas D. Fitz-Gibbon
Attorney

Dated: October 5, 1992

¹On September 11, 1981, the Bureau revoked Burton's amateur station license and affirmed the suspension of his operator license because of his willful and repeated violations of the Commission's Rules in the amateur services. Order of Revocation and Affirmation, PR Docket No. 81-444 (September 11, 1981). Following this action, Burton, on three separate occasions, was found in federal court to have transmitted in the amateur services without a Commission license. United States of America v. Richard A. Burton, No. CR 82-378-R (C.D. Cal. June 28, 1982) (conviction on four counts of transmitting without a license and two counts of transmitting obscene language); United States of America v. Richard A. Burton, No. 82-00378 (C.D. Cal. May 1, 1985) (finding violation of the terms of probation by operating a radio apparatus without a license; modifying sentence to include therapy); United States of America v. Richard A. Burton, No. CR-90-357-RMT (C.D. Cal. October 1, 1990) (conviction for transmitting without a license). But see United States of America v. Richard A. Burton, No. 82-1391 (9th Cir. October 25, 1983) (affirming the 1982 conviction for transmitting without a license, while overturning conviction for transmitting obscene language on First Amendment grounds).

Certificate of Service

I, Kimberly Thomas, certify that on October 5, 1992, a copy of the foregoing
BUREAU'S OPPOSITION TO EXCEPTIONS, filed on behalf of the Chief, Private Radio
Bureau, was sent by First Class Mail to:

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The Review Board
Federal Communications Commission
2000 L Street, N.W.
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(Hand-carried)

A handwritten signature in cursive script that reads "Kimberly Thomas". The signature is written in dark ink and is positioned below the typed name of the certifier.